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FEDEX

February 26, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 98-6
**Comments of the South Dakota Public Utilities Commission
Opposing the Joint Petition of the Cheyenne River Sioux
Tribe Telephone Authority and US WEST Communications,
Inc. for Expedited Ruling Preempting South Dakota Law**

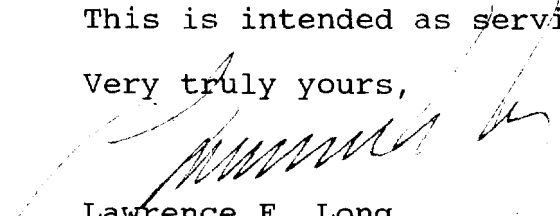
Dear Ms. Salas:

Enclosed is an original and 12 copies of the Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition of the Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc. for Expedited Ruling Preempting South Dakota Law along with attachments.

All other interested parties have been served as well.

This is intended as service upon you.

Very truly yours,


Lawrence E. Long
Chief Deputy Attorney General

LEL:jp

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF

THE CHEYENNE RIVER SIOUX)	CC DOCKET NO. 98-6
TRIBE TELEPHONE AUTHORITY'S)	
AND U S WEST COMMUNICATIONS,)	
INC.'S JOINT PETITION FOR)	
EXPEDITED RULING PREEMPTING)	
SOUTH DAKOTA LAW)	

COMMENTS OF THE SOUTH DAKOTA
PUBLIC UTILITIES COMMISSION
OPPOSING THE JOINT PETITION OF THE
CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY
AND US WEST COMMUNICATIONS, INC. FOR AN
EXPEDITED RULING PREEMPTING SOUTH DAKOTA LAW

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**COMMENTS OF THE SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION OPPOSING THE JOINT PETITION**

SUMMARY

The South Dakota Public Utilities Commission (hereafter SDPUC) acting under SDCL 49-31-59 disapproved a proposed sale of three local telephone exchanges from US WEST Communications, Inc. (hereafter US WEST) to the Cheyenne River Sioux Tribe Telephone Authority (hereafter CRSTTA). US WEST and CRSTTA appealed to the Hughes County, South Dakota Circuit Court, and simultaneously sued the SDPUC in United States District Court for South Dakota. In both the state appeal and the federal action, US WEST and CRSTTA asserted that exclusive jurisdiction to regulate US WEST within "Indian Country" rested in the Cheyenne River Sioux Tribe (or the Standing Rock Sioux Tribe)¹ and that general principles of Indian law preempted SDPUC regulation of the proposed sales. The United States District Court action has been held in abeyance pending the resolution of the state court appeal. Circuit Court Judge Zinter

¹ The Morristown, McIntosh, and part of the Timber Lake exchanges (proposed to be sold) are located on the Standing Rock Indian Reservation. The Standing Rock Sioux Tribe is not party to any of the pending proceedings.

ruled on February 21, 1997, in the state court appeal that SDPUC authority to regulate US WEST in Indian country was not preempted and that SDPUC had the power to disapprove the sales. (Decision at 2). However, the state circuit court remanded the case to SDPUC for additional findings and to reconsider its decision. The court ruled that SDPUC could not condition approval of the sales upon waiver of sovereign immunity by CRSTTA, but could consider the impact of tribal sovereign immunity in its reconsideration. (Decision at 30).

The SDPUC entered Amended Decisions and again disapproved the sales on August 22, 1997. US WEST and CRSTTA again appealed to state circuit court. On January 22, 1998, US WEST and CRSTTA petitioned the FCC for preemption of SDCL 49-31-59 under 47 U.S.C. § 253. On February 11, 1998, Judge Zinter upheld the Amended decisions of SDPUC. (SDPUC Attachment A at 54 to end). US WEST and CRSTTA currently have pending an appeal of SDPUC's decisions as amended to the South Dakota Supreme Court.

ISSUE

This Commission should determine that SDCL 49-31-59 does not on its face, or as applied, have the effect of prohibiting the CRSTTA from providing local telephone service. The scope of this inquiry is whether SDCL 49-31-59 has an adverse impact on competition. Since neither approval or denial of the proposed sales under SDCL 49-31-59 will have any effect on competition, 47 U.S.C. § 253(a) and (b) are not violated and the Petition should be dismissed.

The issues of Indian law preemption, SDPUC civil regulatory jurisdiction in Indian country, and tribal sovereign immunity raised by US WEST and CRSTTA in this proceeding are vitally important to the litigants in the pending state and federal court proceedings. However, these issues do not require resolution by the Commission in order to determine whether SDCL 49-31-59 should be preempted, because Commission preemption is based upon barriers to competition, not Indian law preemption criteria.

In the alternative, the Commission should recognize that the denial of the sales by the SDPUC were necessary to safeguard the rights of consumers and are therefore not subject to preemption. 47 U.S.C. § 253(b).

FACTUAL BACKGROUND

In 1889, Congress fixed the boundaries of a reservation for the Cheyenne River Tribe of Sioux Indians in western South Dakota. 25 Stat. 888.² Later that year, South Dakota was admitted to the Union. In 1908, Congress purchased 1.6 million acres of the Cheyenne River Sioux Reservation from the Tribe and opened the same for non-Indian homesteading. Many non-Indians homesteaded in the opened lands in the early 1900s. Solem v. Bartlett, 465 U.S. 463 (1984). As a result Dewey County, South Dakota and Ziebach County, South Dakota were organized in 1909 and 1911 respectively. The boundaries of Dewey and Ziebach Counties are virtually identical to the Cheyenne River Reservation boundaries. The Supreme Court in

² The same statute fixed the boundaries of the Standing Rock Sioux Reservation in South Dakota.

Solem v. Bartlett held that the "Surplus Land" statute which opened 1.6 million acres of Dewey and Ziebach Counties for non-Indian homesteading did not diminish the Cheyenne River Sioux Reservation boundaries.³ Consequently, even though Dewey and Ziebach Counties contain a substantial population of non-Indians and much of the land is now owned by non-Indians, the area is Indian country.⁴

The Cheyenne River Sioux Tribe entered the telephone business in 1958. See Attachment B. In 1974, the Cheyenne River Sioux Tribal Council enacted Ordinance No. 24 creating the CRSTTA. CRSTTA currently operates five local exchanges--Dupree (365), Isabel (466), South Dupree (538), La Plant (733) and Eagle Butte (964). Four of these exchanges lay within the exterior boundaries of the Cheyenne River Indian Reservation. However, the Isabel exchange lays only partially within the Cheyenne River Indian Reservation. The balance (about 176 square miles) is located in Corson County on the Standing Rock Indian Reservation. Four other telephone companies (all non-tribal) operate partially within the Cheyenne River Indian Reservation--namely, Golden West Telephone

³ The existence of reservation boundaries is a significant component of the definition of Indian country. See 18 U.S.C. § 1151.

⁴ The "surplus land" was left over after the Bureau of Indian Affairs "allotted" or assigned specific tracts of land to tribal members. The legal title to this "allotted" land was held by the United States of America in trust for the tribal members for 25 years and then a "fee patent" was issued giving the member unrestricted ownership. Much of this land also passed out of Indian ownership. As a result, the Cheyenne River and Standing Rock Reservations are mixed land holdings of tribal land, Indian allotments and non-Indian fee lands in a checkerboard pattern. See Solem; see also, South Dakota v. Bourland, 508 U.S. 679 (1993).

Coop., West River Coop., Mobridge Telecommunications and US WEST.⁵

Judge Zinter described the disputed exchanges as follows:

The Timber Lake exchange serves the City of Timber Lake in Dewey County. Timber Lake is the county seat of Dewey County. According to the 1990 census, approximately two-thirds of the populations of Timber Lake are non-Indians. When the surrounding area of the Timber Lake exchange is considered, approximately 80 % of the population is non-Indian. Non-Indian and non-member Indian telephone subscribers have no vote or political voice in the government of the CRSTTA or the CRST.

The McIntosh exchange serves the City of McIntosh and the surrounding farm and ranch community. The City of McIntosh is the county seat of Corson County. No part of the McIntosh exchange is located on the Cheyenne River Indian Reservation. The exchange is located within the boundaries of the Standing Rock Indian Reservation. The population residing in this exchange consists primarily of individuals that are not members of the Standing Rock Sioux Tribe. Neither Standing Rock Sioux Tribal members, CRST members, nor non-Indians who reside in this exchange have a vote or political voice in the government of the CRSTTA or the CRST.

The Morristown exchange serve the City of Morristown and the surrounding farm and ranch community. No part of the Morristown exchange lies within the Cheyenne River Indian Reservation. Like the McIntosh exchange, the Morristown exchange is located within the boundaries of the Standing Rock Indian Reservation. Neither Standing Rock Sioux Tribal members, CRST member nor non-Indians who reside in this exchange have a vote or political voice in the CRSTTA or the CRST.

⁵ A colored map of the current boundaries of the CRSTTA and adjacent phone exchanges in Dewey, Ziebach and southern Corson counties is included in ADD/USD File # 98-21.

(Decision at 9 and 10.)

Regulatory History:

The South Dakota Public Utilities Commission (hereafter SDPUC) has general regulatory authority over:

[A]ll telecommunications companies and to all telecommunications lines and facilities of any kind, character or description and used by any corporation, receiver, trustee or other person operating a telecommunications company whether owned or operated under contract, agreement, lease or otherwise.

SDCL 49-31-2. The SDPUC has been part of the state/federal telecommunications regulatory scheme for several years.

The Commission has general supervision and control of all telecommunication companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The Commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the law of the state governing such companies. The Commission may exercise powers necessary to properly supervise and control such companies.

SDCL 49-31-3.

SDPUC has general regulatory authority to fix reasonable fares and rates or prices except for those telecommunications services which are fully competitive. SDCL 49-31-12.

SDPUC is charged with the obligation of protecting consumers against discriminatory pricing or services.

No person or telecommunications company may unjustly or unreasonably discriminate between persons in providing telecommunications services or the rate or price charged for those services . . . Notwithstanding any prohibitions in this section upon application to the Commission any telecommunications company may, after investigation by the Commission be authorized by the Commission to charge special rates or give certain

preferences which are determined by the Commission to be fair and reasonable . . ."

SDCL 49-31-11.

When the SDPUC acts to ensure reasonable, fair and non-discriminatory pricing and services by all telecommunications companies, it is acting in the "public interest."

However, under current law only US WEST is subject to direct SDPUC local rate regulation. Under the South Dakota regulatory scheme, telephone cooperatives, municipal phone companies and independent phone companies serving less than 10,000 local exchange subscribers are exempt. SDCL 49-31-5.1. Cooperatives, however, are member owned. Each subscriber is a member of the coop and can vote for (and serve on) the Board of Directors which sets the rates. Thus, telephone cooperatives are self-regulating in that the membership fixes their own rates.

Municipal phone systems are the same. Municipal phone companies may serve only residents within the city limits. See generally, SDCL 9-41. Consequently, city residents who receive phone service have a direct political voice by voting for (or being elected to) the municipal offices which fix municipal phone rates. Consequently they are also self-regulated.

The privately owned telephone companies in South Dakota with less than 10,000 subscribers do not automatically escape the state regulatory net. SDCL 49-31-5.2 allows subscribers of such companies to force an election of subscribers which (if successful) places the company under full SDPUC regulation.

Moreover, SDPUC does retain other significant regulatory control over all companies serving local subscribers. All companies are subject to SDPUC supervision and control under SDCL 49-31-3. All companies can also be ordered to make improvements in the public interest under SDCL 49-31-7. Likewise, all companies are prohibited from discriminatory pricing and similar practices. SDCL 49-31-11.

In other words, consumers of local telephone service in South Dakota enjoy general regulatory protection through the SDPUC or by participating in their municipal or cooperative phone company, with one possible exception. The consumers who may not be protected are the non-CRST member telephone subscribers currently served by the CRSTTA in the exchanges of Dupree, Isabel, South Dupree, La Plant and Eagle Butte.

It is the uncertainty whether non-CRST member phone subscribers have any realistic consumer protection against the CRSTTA telephone monopoly which is driving both the state and federal court litigation pending between CRSTTA, US WEST, and the SDPUC. However, resolution of the pending state and federal litigation will not define the consumer protection remedies (if any) of non-CRST member phone subscribers against CRSTTA.

The Federal Communications Commission does not need to reach this issue in order to resolve the current petition, because the proposed sale does not violate 47 U.S.C. § 253(a) or (b).

The proposed sale of three local exchanges from US WEST to CRSTTA will not impact competition.

CRSTTA and US WEST have petitioned the Commission for a declaratory ruling preempting enforcement of SDCL 49-31-59 as applied to Indian tribes or tribal entities. CRSTTA and US WEST contend that the SDPUC's application of SDCL 49-31-59 constitutes a barrier to entry and asks the Commission to preempt under 47 U.S.C. § 253(d). The Petition should be denied since this case does not involve any issues concerning competition.

By passing the Telecommunications Act of 1996 (1996 Act), Congress sought to establish a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition." S. Conf. Rep No. 104-230, 104th Cong., 2d Sess. 1 (1996). Sections 251 and 252 are the provisions designed to open up local markets by providing different options for a competitor to use in order to compete against an incumbent local exchange carrier (LEC).

Another provision of the 1996 Act, section 253, gives the Commission the authority to remove barriers to competitive entry. Section 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." However, section 253(b) allows a state "to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service,

protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

In interpreting these provisions, the Commission has decided that it will "first determine whether the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone." In the Matter of the Public Utility Commission of Texas, Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulation Act of 1995, CCBPol 96-13, Memorandum Opinion and Order, FCC 97-346 ¶ 42 (1997). If the Commission finds that the challenged law, regulation or legal requirement violates section 253(a), then the Commission will "determine whether the requirement nevertheless is permissible under section 253(b)." Id.

The Commission's interpretation of section 253 is that it "establishes a statutory framework to eliminate state and local measures that thwart the development of competition in the provision of telecommunications services." Public Utility Commission of Texas at ¶ 21 (emphasis added). Similarly, in another decision the Commission found that it would consider whether the challenged law or regulation "materially inhibited or limited the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934,

CCBPol 96-26, Memorandum Opinion and Order, FCC 97-251 ¶ 31 (1997) (emphasis added).

In its Petition, US WEST and CRSTTA recognize that section 253 is designed to deal with barriers to competition. For example, the Petitioners state that "[s]ection 253 constitutes congressional preemption of state law where such state law is a barrier to open competition in the telecommunications service field." Petition at 9 (emphasis added). They further proclaim that the 1996 Act "adopts a new policy of unconditionally removing all legal and economic impediments to the provision of competitive local exchange services at the earliest time possible." Petition at 8 (emphasis added).

The insurmountable difficulty the Petitioners face is that the issues presented in their Petition have nothing to do with competition. The statute US WEST and CRSTTA is asking this Commission to preempt involves the sale of local exchanges by one company to another company. It is not a statute that limits the ability of a company to compete with an incumbent local exchange company. The simple fact is that if the SDPUC had approved the sale of the three exchanges to CRSTTA, the customers located in those exchanges would not be enjoying the benefits of competition since CRSTTA would merely be taking the place of US WEST. The only effect of the sales would be the exchange of one monopoly provider for another monopoly provider.

Moreover, the denial of the sales actually makes it more likely that competition will develop in these three exchanges.

First, CRSTTA is a rural telephone company that, if it had been allowed to buy the three exchanges, would have enjoyed the benefits of the rural protection statute contained in the 1996 Act. See 47 U.S.C. § 251(f). This statute makes it more difficult for competitors to compete by giving rural telephone companies an automatic exemption from section 251(c) requirements and the right to ask for modifications or suspension of section 251(b) requirements. US WEST, as a nonrural telephone company, is unable to take advantage of any of these rural protections. Thus, with US WEST as the incumbent local exchange carrier, competitors can more easily compete in the Timber Lake, McIntosh, and Morristown exchanges.

Second, since it is CRSTTA's position that it is not subject to the regulatory authority of the SDPUC, (Decision at 12 n.7) the question becomes whether CRSTTA would recognize any actions taken by the SDPUC with respect to allowing competition in any exchange owned by CRSTTA. For example, although the SDPUC designated CRSTTA as an eligible telecommunications carrier (ETC) for the exchanges it currently owns, CRSTTA nonetheless applied to the FCC for ETC designation claiming the SDPUC lacked the jurisdiction to designate CRSTTA as an ETC. In the Matter of Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419 (filed Jan. 16, 1998). This leads to the question of whether CRSTTA would comply with any SDPUC

actions regarding the lifting of the rural exemption for exchanges operated by CRSTTA.

The Petitioners' assertion that the SDPUC's decisions denying the sales "prohibit the Telephone Authority from providing interstate and intrastate telecommunications services" is untrue. (Petition at 10.) As this Commission has recognized, sections 251 and 252 seek to "secure to new competitors the right to enter local telecommunications markets through different avenues: (1) construction of their own networks and interconnection with incumbent local exchange carriers (incumbent LECs); (2) use of unbundled network elements provided by incumbent LECs; (3) resale of incumbent LEC retail services purchased at wholesale rates; or (4) any combination of these three entry methods." Public Utility Commission of Texas at ¶ 2. The SDPUC has not denied CRSTTA the ability to construct its own network in these exchanges. The SDPUC has not denied CRSTTA the ability to use US WEST's unbundled network elements in order to provide customers in the Timber Lake, McIntosh and Morristown exchanges a competitive choice of providers. The SDPUC has not denied CRSTTA the ability to resell US WEST's retail services. Thus, the SDPUC has not inhibited or limited the ability of CRSTTA to compete in the three exchanges at issue. The SDPUC has denied the sale of these exchanges. The 1996 Act contains no provision that would prohibit a state commission from granting or denying the sale of an exchange. Of course, the reason why no such provision exists is because the sale of an

exchange by one incumbent LEC to another LEC has nothing to do with competition.

The Petitioners concede that the avenues to competition contained in sections 251 and 252 are available to CRSTTA and acknowledge that CRSTTA has not attempted to take advantage of these competitive provisions. Petition at 15-16. Instead, the Petitioners are asking this Commission to preempt a state statute because the SDPUC declined to allow the substitution of one incumbent LEC for another LEC. Competition is not even remotely an issue in this case. The Petitioners' assertion that the SDPUC would not let CRSTTA resell US WEST services has absolutely no basis in fact.⁶ Petition at 16. CRSTTA has shown no inclination that it desires to be a competitive provider; it merely wants to expand its monopoly and take over as the new incumbent LEC for the Timber Lake, Morristown, and McIntosh exchanges.

Clearly, since this case does not involve any restrictions on competitive entry, the Commission cannot preempt SDCL 49-31-59. The Petitioners have failed to show that the SDPUC's application of

⁶ The reasons for denying the sale involved the loss of significant tax revenues and the uncertainty over what, if any, recourse a customer would have to complain about service problems and unregulated rates concerning a monopoly provider. These reasons would not be implicated if CRSTTA provided competitive services in these exchanges since U S WEST would still be paying taxes on its property and competitive choices for a provider would mean a monopoly no longer existed.

SDCL 49-31-59 violates the provisions of section 253(a) on its face and, therefore, their Petition must be denied.⁷

The state court has already rejected the identical preemption argument from CRSTTA and US WEST.

CRSTTA and US WEST advanced a 47 U.S.C. § 253 preemption argument to the state circuit court and the SDPUC below. The state circuit court found that the denial of the sale enhanced, rather than prohibited competition. The state court rejected the argument that the federal Indian policy mandated approval of the sales:

In addition, general federal Indian policy and Tribal interests are not threatened by the Commission's exercise of jurisdiction. The Telecommunications Act of 1996, Pub. L. No. 104-104 (1996) (to be codified at 47 U.S.C. §§ 151 et seq.), was signed into law after oral argument was held in this case. Under that Act, US WEST may no longer maintain its monopoly over these local exchanges. Competition by others, like the CRSTTA, is now encouraged. In addition, under section 251(b)(1) of the 1996 Act, US WEST has "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services" to the CRSTTA. 47 U.S.C. § 251(b)(1) (emphasis added). Therefore, even if the CRSTTA does not purchase these exchanges, it is now free to operate its own local service in the same exchange territory. In fact, the CRSTTA is not only free to operate in the same territory, it is encouraged to compete without the purchase by reselling telecommunications services from US WEST without fear of discrimination or unreasonable conditions.

(Decision at 19-20.)

⁷ The denial does not mean that the Petitioners are foreclosed from obtaining review of the SDPUC's decision. The Petitioners have other remedies which they have pursued. Not only have the petitioners appealed the SDPUC's denial of the sales in state court, they have also brought an action in federal court.

The CRSTTA may now enter the US WEST market regardless of the sales:

The Commission's disapproval of the sale will not usurp the CRST's authority, nor will it impose a legal barrier for the CRST to raise revenue as the Commission's disapproval has no legal impact on tribal self-government or tribal business and economic affairs. The CRSTTA is not only free, but is encouraged, to enter this market and provide its own local telephone service in the same territory without purchase of the exchanges. Under these circumstances, Commission disapproval of the sale will not "preclude tribal businesses from engaging in commercial activities in Indian country."

(Decision at 20.)

The state court found the CRSTTA's status is unchanged by disapproval of the sales:

Commission jurisdiction does not interfere with Reservation resources or existing CRSTTA service in these exchanges. Recent federal legislation not only permits, but encourages the CRSTTA to now operate its telephone business in these exchanges even if they are not purchased.

(Decision at 24.)

US WEST may have nothing to sell now, except wholesale services:

Under The Telecommunications Act of 1996, the CRSTTA is not only free, but encouraged to operate its telecommunications business in the same service territory.

(Decision at 28.)

Although the state court findings are not binding on the FCC, the logic is sound and the reasoning should be adopted by the Commission.

The SDPUC disapproval of the sales acted to safeguard the rights of consumers in the Morristown, McIntosh and Timber Lake exchanges and should be upheld.

Assuming, arguendo, that the Commission determined that SDCL 49-31-59, as applied, violated 47 U.S.C. § 253(a), nonetheless, the law as applied safeguarded the rights of the non-CRST member telephone subscribers in the three disputed exchanges, and therefore, is conduct protected from preemption under 47 U.S.C. § 253(b).

CRSTTA and US WEST originally argued that SDPUC jurisdiction had been entirely preempted over both reservations.

The CRSTTA asserts that the CRST and the Standing Rock Sioux Tribe have exclusive jurisdiction to regulate the sale of U S West's exchanges. They argue there is no room for concurrent state jurisdiction.

(Decision at 12 n.7.)

The court rejected that notion, observing that US WEST had been regulated for on-reservation conduct for many years without objection. The court did not decide the exact nature of the SDPUC jurisdiction, but did observe that SDPUC regulation of US WEST in the disputed exchanges was not preempted:

Here, each of the three exchanges contains a captive group of Indian, non-Indian and non-tribal member subscribers who must rely on the exchanges for telecommunications services. Although a part of the Timber Lake exchange is on the Cheyenne River Indian Reservation, the vast majority of the Timber Lake subscribers, and none of the Morristown and McIntosh subscribers, have any political voice in the CRSTTA or the CRST. Therefore, absent Commission jurisdiction, only an extremely small percentage of subscribers would have the protection of government regulation of sales by an entity in which the subscribers have a

political voice. Under those circumstances, the Commission has a governmental interest in providing regulation to all subscribers of the exchanges.

(Decision at 22-23.) (Emphasis added.)

The SDPUC, as recognized by the court, was legitimately motivated by a concern that the subscribers in the disputed exchanges could only be assured of meaningful consumer protection by disapproving the sales. The disapproval kept in place a "regulated" monopoly (US WEST). Approval of the sales allows takeover by a different monopoly (CRSTTA).⁸

US WEST and CRSTTA have failed to support their petition with facts.

US WEST and CRSTTA have made numerous assertions in this petition which are unsupported. Any arguments based on these unsupported allegations should be rejected.

For example, CRSTTA asserts that they have never been regulated by the SDPUC. (Petition at 2, n. 1 and 5). In reality, the question is unanswered and neither CRSTTA or SDPUC have elected to litigate it. CRSTTA has historically sought out the regulatory power of SDPUC when it was to their advantage. For example, CRSTTA

⁸ The law is becoming fairly settled that inherent tribal sovereignty is limited to tribal lands and tribal members. See Montana v. U.S., 450 U.S. 544, 565 (1981). Also, "South Dakota retains civil regulatory jurisdiction over non-member Indians in the same way that it does over non-Indians on the reservation." (Decision at 27). However, even in the face of an established duty, tribal sovereign immunity may still be asserted as a defense. See Oklahoma Tax Commn. v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). Consequently, even assuming SDPUC had an established right to regulate and protect non-members and non-Indians from discriminatory practices and rates by CRSTTA, the defense of tribal sovereign immunity may preclude effective state regulation.

made application for ETC designation to both SDPUC and this Commission. (Petition at 6 n. 2). In 1958 and 1975, CRSTTA applied for and received Certificates of Public Convenience and Necessity in order to acquire and expand their telephone exchanges. See Attachments B and C.

Also, CRSTTA makes this unsupported assertion:

Given the goal of the Communications Act to encourage competition at the local exchange level, if the Telephone Authority is not offering competitive services, there will be new entrants into these markets. In other words, the discipline of the marketplace will work on the Cheyenne River and the Standing Rock Indian Reservations just as it works elsewhere.

CRSTTA cannot support this assertion. No local competition currently exists in the disputed exchanges. (Petition at A-2). In fact, no local competition exists in any exchange currently operated by CRSTTA. CRSTTA has not demonstrated how competition would be enhanced if CRSTTA owned the Morristown, McIntosh and Timber Lake exchanges. The fact is probably the reverse. See Discussion at page 11 infra.

CRSTTA asserts that SDPUC disapproval of the sales has the effect of precluding CRSTTA from resale entry into the US WEST exchanges. (Petition at 15-16). US WEST and CRSTTA offer no factual support. The state court noted their failure of proof on a similar point. (Petition at 15; Decision at 21, n. 13). US WEST and CRSTTA may offer evidence in this proceeding, but have chosen not to. The record is devoid of any evidence that resale entry cannot be made by CRSTTA into the US WEST exchanges economically.

Finally, the Petitioners predict that SDPUC will disapprove any interconnection agreement under 47 U.S.C. § 252(e) to which CRSTTA is a party. Again, the Petitioners offer no proof that SDPUC will not apply the criteria set forth in 47 U.S.C. § 252 objectively. In reality, no interconnection agreement has been shown to exist between CRSTTA and US WEST. However, if such an agreement were implemented, the consumers would likely benefit by having a choice of provider, which is more than they have now.

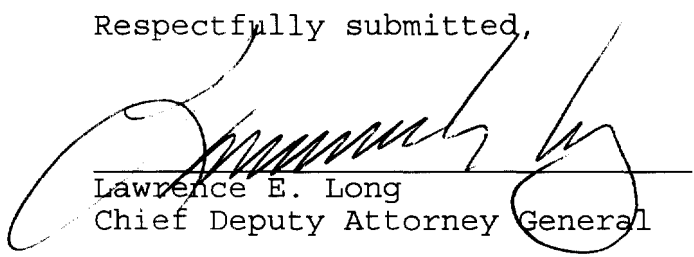
CONCLUSION

Today, subscribers of the McIntosh, Morristown and Timber Lake exchanges receive phone service from US WEST (a regulated monopoly) and consumer protection from SDPUC.

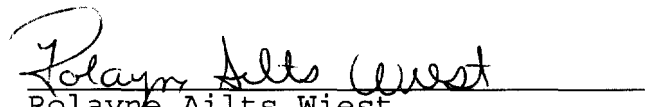
If the sales were approved, then tomorrow, the same subscribers would receive phone service from CRSTTA, and (a different monopoly) but uncertain consumer protection services.

Because the proposed sales (or lack thereof) did not impact competition, but do raise uncertainty about continued safeguards of rights of consumers, the petitions should be dismissed.

Respectfully submitted,



Lawrence E. Long
Chief Deputy Attorney General



Rolayne Ailts Wiest
Special Assistant Attorney General
S.D. Public Utilities Commission

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition of the Cheyenne River Sioux Tribe Telephone Authority's and US WEST Communications, Inc.'s for Expedited Ruling Preempting South Dakota Law** were sent via overnight Federal Express to the following individuals at their last known address:

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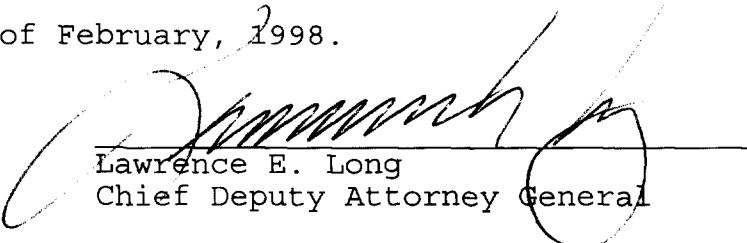
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Dated this 26th day of February, 1998.



Lawrence E. Long
Chief Deputy Attorney General

COPY

IN CIRCUIT COURT

STATE OF SOUTH DAKOTA)
) SS
 COUNTY OF HUGHES)

SIXTH JUDICIAL CIRCUIT

CHEYENNE RIVER SIOUX TRIBE
 TELEPHONE AUTHORITY and US
 WEST COMMUNICATIONS, INC.,

CIV. NO. 97-348

RECEIVED

FEB 23 1998

Appellant,

-vs-

SOUTH DAKOTA PUBLIC
 UTILITIES COMMISSION

PUBLIC UTILITIES COMMISSION
 OF SOUTH DAKOTA,

TRANSCRIPT OF

Appellee, and

ORAL ARGUMENT

CORSON COUNTY COMMISSION,
 McINTOSH CITY COUNCIL and
 DOUG SCOTT,

Intervenors.

BEFORE: THE HONORABLE STEVEN L. ZINTER,
 Circuit Court Judge of the Sixth
 Judicial Circuit, Pierre, South
 Dakota, on February 11, 1998.

APPEARANCES:

Counsel for Appellants: THOMAS J. WELK, ESQ.
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